

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY SHEPHERD HARRISON,

Defendant-Appellant.

UNPUBLISHED

September 26, 2006

No. 261155

Kalamazoo Circuit Court

LC No. 04-000013-FH

Before: Sawyer, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree child abuse, MCL 750.136b(5). He appeals his conviction and sentence as of right. We affirm.

In November 2003, defendant lived in a one-bedroom apartment with Courtney Brooks, a night waitress at a Denny's Restaurant, and her two young daughters. On November 13, 14, and 15, a Thursday, Friday, and Saturday, Brooks was sick with the flu. According to Brooks, when she was not working, she was sleeping. She had no contact with her two daughters from Wednesday evening or Thursday morning until Saturday morning. Defendant cared for Brooks' daughters while she worked and slept. On Saturday morning, Brooks found her youngest daughter sitting in a bedroom closet with bruises on her face, neck, shoulders, arm, and back.

At defendant's trial for third-degree child abuse, defendant moved to offer the testimony of six witnesses who would have testified that they observed Brooks act violently toward her two daughters. The trial court precluded the witnesses from testifying. On appeal, defendant challenges the trial court's ruling. We review a trial court's decision to admit or deny evidence for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). An abuse of discretion is found when an unprejudiced person, considering the facts upon which the trial court acted, would say there was no justification or excuse for the ruling. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). An abuse of discretion requires more than a mere difference of opinion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). Further, a trial court's decision on a close evidentiary question is not an abuse of discretion. *Id.*

Defendant initially argues that the trial court erred in preventing his six proposed witnesses from testifying as a sanction for his failure to comply with the trial court's discovery orders. However, when the trial court ruled that it would not allow defendant's six proposed witnesses to testify, it expressly stated that it was making its ruling on a substantive, rather than a

procedural, basis. Accordingly, defendant's argument is not supported by the record, and thus, it is without merit.

Defendant additionally argues that the trial court erred by classifying the testimony of his six proposed witnesses as MRE 404(b) evidence. Defendant asserts that the testimony of his proposed witnesses should have been classified as "relevant evidence not of a collateral issue" because the testimony was relevant to Brooks's credibility. At trial, Brooks testified that she never hit her daughters on their faces or heads. Defendant cited two cases, *Davis v Alaska*, 415 US 308, 316; 94 S Ct 1105; 39 L Ed 2d 347 (1974), and *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995), to support his argument that, because the testimony of his six proposed witnesses was relevant to Brooks's credibility, their testimony was admissible. However, both of the cases cited by defendant are factually distinguishable from the present case. In *Davis, supra*, and *Coleman, supra*, the respective court was concerned with a party's ability to pry into a witness's credibility during cross-examination. Defendant is not arguing that the trial court impermissibly limited his cross-examination of Brooks with respect to her credibility. Defendant has not cited any authority that actually supports his argument that the testimony of his six proposed witnesses "was relevant evidence not of a collateral issue," rather than MRE 404(b) evidence. And, we find that the proposed testimony was inadmissible MRE 404(b) evidence.

Pursuant to MRE 404(b), other acts evidence must be offered for a purpose other than to show character or propensity. *People v Sabin (After Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2000). Proper purposes under MRE 404(b) include "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident." MRE 404(b). Defendant argues that the evidence at issue was evidence of a common plan or scheme by Brooks against the children. MRE 404(b) allows evidence of uncharged acts to be admitted if they "are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Sabin (After Remand), supra* at 55; see also *Hine, supra* at 251. Distinctive and unusual features are not required to establish the existence of a common design or plan. *Sabin (After Remand), supra* at 65-66.

In the present case, Robert Elkins, one of defendant's six proposed witnesses, testified as an offer of proof that, on numerous occasions, he observed Brooks "smack" her two daughters on their faces and heads. Elkins also testified that he observed Brooks, again on numerous occasions, pull her daughters' arms so hard that she almost pulled them out the sockets. We agree that there is similarity between Brooks's alleged previous acts of violence toward her two daughters and the conduct that resulted in the injuries sustained by the victim, her youngest daughter. The victim had multiple bruises on her face. The emergency room doctor opined that the bruises may have been caused by a hand striking her face. The victim also had bruises on the back of her head by her neckline. The doctor opined that these bruises were consistent with a child rolling her head forward to protect herself. Finally, the victim had bruises on the inside and outside of her right arm. The doctor testified that this type of bruising was commonly seen in a situation where an arm is grabbed. Despite this similarity, however, we do not believe that the trial court abused its discretion in prohibiting defendant's six proposed witnesses from testifying. The youngest daughter's injuries were common injuries sustained in an assault, and there was no evidence that Brooks' prior alleged conduct caused any bruising or injury. In order for evidence to be admissible under MRE 404(b), however, it is not enough to simply articulate a proper purpose. *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). The evidence must be

relevant. *Id.* It must be related to a fact that is of consequence and “truly must be probative of something *other* than” propensity to commit a crime. *Id.* at 390. Defendant’s defense was that he was not the only caretaker of the children during the relevant time and that he was not responsible. He wanted to admit the testimony of Brooks’ bad acts to show that she may have caused the victim’s injuries. This was clearly propensity evidence. Under these circumstances, we are unable to conclude that the trial court abused its discretion in prohibiting defendant’s six proposed witnesses from testifying to the violence they observed between Brooks and her two daughters.

Defendant next claims on appeal that he was denied effective assistance of counsel. Because defendant did not move for a new trial or for a *Ginther*¹ hearing, our review of defendant’s claim is limited to the appellate record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000).

Defendant first argues that he was denied effective assistance of counsel because his counsel failed to locate and produce certain witnesses at trial. Defendant, however, has failed to provide the identity of these alleged witnesses or the substance of their proposed testimony. Because a party’s failure to properly address the merits of his argument constitutes abandonment of the issue, *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004), we decline to address the issue.

Defendant also argues that he was denied effective assistance of counsel because his counsel referred to his federal drug conviction and sentence during opening statements and while questioning defendant. Our review of the record reveals that counsel’s references to defendant’s federal conviction and sentence was a matter of trial strategy. Defendant’s credibility was at issue, and counsel was merely attempting to bolster defendant’s credibility by arguing that, because he was already in prison, he had no legitimate reason to falsely deny the child abuse allegations. This Court will not second-guess counsel on matters of trial strategy. *People v Henry*, 239 Mich App 140, 148; 607 NW2d 767 (1999).

Finally, on appeal, defendant claims that he is entitled to be resentenced. Defendant makes two separate arguments: (1) the trial court erred in scoring 50 points for offense variable (OV) 7, MCL 777.37, because his conduct was not designed to cause or substantially increase the victim’s fear; and (2) the trial court failed to articulate substantial and compelling reasons for imposing a prison sentence rather than an intermediate sanction.

First, when “a scoring error does not alter the appropriate guidelines range, resentencing is not required.” *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). The trial court’s scoring of defendant’s prior record variables (PRVs) and offense variables (OVs) resulted in a recommended sentence range of 0 to 17 months’ imprisonment. Defendant only challenges the trial court’s scoring of OV 7. But, even if the trial court scored zero points, instead of 50 points, to OV 7 as defendant argues it should have, the recommended sentence range would have remained 0 to 17 months’ imprisonment. See MCL 777.68. Accordingly, the trial court’s

¹ *People v Ginther*, 390 Mich 436; 441; 212 NW2d 922 (1973).

scoring of OV 7 did not alter the recommended sentence range. Therefore, because defendant would not be entitled to be resentenced even if the trial court did err in scoring OV 7, we decline to address defendant's argument that the trial court erred in scoring OV 7.

Second, the trial court provided the following two reasons for sentencing defendant to a prison term rather than an intermediate sanction: (1) the goals sought to be achieved by an intermediate sentence cannot be achieved because of the length of defendant's federal prison term; and (2) defendant's lack of remorse and refusal to participate in the sentencing process. A trial court may depart from the recommended sentence range under the legislative guidelines only if there is a "substantial and compelling" reason for doing so. MCL 469.34(3); *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003), *clar den* 469 Mich 1224 (2003). Defendant has failed to articulate any basis or provide any authority to support his position that the reasons stated by the trial court to justify its departure from the recommended sentence range under the legislative guidelines were not substantial and compelling. Because a party may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004), defendant has abandoned this issue. We decline to address defendant's abandoned issue, but we note that we have reviewed the articulated reasons and find that they were substantial and compelling reasons that warranted the departure. *Id.* The trial court did not abuse its discretion.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell